4-2013

Defining an Interlocutory Application: OpenNet Pte Ltd v IDA [2013] SGCA 24

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SINGAPORE LAW WATCH
SINGAPORE DAILY LEGAL NEWS

SLW COMMENTARY

Issue 2/Apr 2013

Defining an "interlocutory application"

***OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] SGCA 24**

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With effect from 1 January 2011, the Supreme Court of Judicature Act[1] ("the Act") was amended to introduce a three-pronged approach aimed at "streamlining of appeals to the Court of Appeal arising from interlocutory applications".[2] Given that: (1) interlocutory applications are not likely to involve novel points of law and usually do not affect the substantive rights of the parties; (2) interlocutory applications are usually heard by a High Court Registrar and a party can appeal against the Registrar's decision to a High Court Judge; and (3) a substantive action in a civil suit only enjoys one tier of appeal as of right, the amendments were justified on the basis of striking a better balance between:

> maximising the use of the Court of Appeal's limited resources so that it can focus on substantive cases that help shape legal jurisprudence and, at the same time, allowing it to continue to shape [Singapore] jurisprudence in the area of interlocutory applications.[3]

Under the new three-pronged approach, to determine whether an order made on an interlocutory application was appealable to the Court of Appeal, one would have to determine which of the following three categories the order fell within: (1) non-appealable matters; (2) matters appealable only with leave of court; or (3) matters appealable as of right to the Court of Appeal.[4]

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[1] Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed).

[2] *Singapore Parliamentary Debates, Official Report* (18 October 2010) vol 87 col 1367 (The Senior Minister of State for Law, Assoc Prof Ho Peng Kee).

[3] *Id*, at cols 1367–1395.

[4] Before these amendments, all orders made on interlocutory applications were appealable as of right to the Court of Appeal *unless* they were defined as non-appealable under s 34(1) of the Act or appealable only with leave of court under s 34(2) of the Act. These provisions stated as follows:

> **34.**—(1) No appeal shall be brought to the Court of Appeal in any of the following cases:
> (*a*) where a Judge makes an order giving unconditional leave to defend an action or an order setting aside unconditionally a default judgment;
> (*b*) except if the appellant is the defendant, where a Judge makes an order giving leave to defend on condition that the defendant pays into court or gives security for the sum claimed or an order setting aside a default judgment on condition as aforesaid;

Non-appealable matters are listed under the Fourth Schedule of the Act. Matters appealable only with leave of court are stated under s 34(2) of the Act, which makes reference to orders specified in the Fifth Schedule of the Act.[5] The Fifth Schedule of the Act provides as follows:

> Except with the leave of a Judge, no appeal shall be brought to the Court of Appeal in any of the following cases:
>
> (a) where a Judge makes an order refusing leave to amend a pleading, except if —
>
> (i) the application for such leave is made after the expiry of any relevant period of limitation current at the date of issue of the writ of summons; and
>
> (ii) the amendment is an amendment to correct the name of a party or to alter the capacity in which a party sues, or the effect of the amendment will be to add or substitute a new cause of action;
>
> (b) where a Judge makes an order giving security for costs;
>
> (c) where a Judge makes an order giving or refusing discovery or inspection of documents;
>
> (d) where a Judge makes an order refusing a stay of proceedings;
>
> (e) where a Judge makes an order at the hearing of any interlocutory application other than an application for any of the following matters:
>
> (i) for summary judgment;
>
> (ii) to set aside a default judgment;

(*c*) subject to any other provision in this section, where a Judge makes an interlocutory order in chambers unless the Judge has certified, on application within 7 days after the making of the order by any party for further argument in court, that he requires no further argument;
(*d*) where the judgment or order is made by consent of the parties; or
(*e*) where, by any written law for the time being in force, the judgment or order of the High Court is expressly declared to be final.
(2) Except with the leave of the Court of Appeal or a Judge, no appeal shall be brought to the Court of Appeal in any of the following cases:
(*a*) where the amount or value of the subject-matter at the trial is $250,000 or such other amount as may be specified by an order made under subsection (3) or less;
(*b*) where the only issue in the appeal relates to costs or fees for hearing dates;
(*c*) where a Judge in chambers makes a decision in a summary way on an interpleader summons where the facts are not in dispute;
(*d*) an order refusing to strike out an action or a pleading or a part of a pleading; or
(*e*) where the High Court makes an order in the exercise of its appellate jurisdiction with respect to any proceedings under the Adoption of Children Act (Cap. 4) or under Part VII, VIII or IX of the Women's Charter (Cap. 353).

[5] Section 34(2) of the Act reads as follows:
(2) Except with the leave of a Judge, no appeal shall be brought to the Court of Appeal in any of the following cases:
(*a*) where the amount in dispute, or the value of the subject-matter, at the hearing before the High Court (excluding interest and costs) does not exceed $250,000 or such other amount as may be specified by an order made under subsection (3);
(*b*) where the only issue in the appeal relates to costs or fees for hearing dates;
(*c*) where a Judge in chambers makes a decision in a summary way on an interpleader summons where the facts are not in dispute;
(*d*) where a Judge makes an order specified in the Fifth Schedule, except in such circumstances as may be specified in that Schedule; or
(*e*) where the High Court makes an order in the exercise of its appellate jurisdiction with respect to any proceedings under the Adoption of Children Act (Cap. 4) or under Part VII, VIII or IX of the Women's Charter (Cap. 353).

(iii) to strike out an action or a matter commenced by a writ of summons or by any other originating process, a pleading or a part of a pleading;

(iv) to dismiss an action or a matter commenced by a writ of summons or by any other originating process;

(v) for further and better particulars;

(vi) for leave to amend a pleading;

(vii) for security for costs;

(viii) for discovery or inspection of documents;

(ix) for interrogatories to be varied or withdrawn, or for leave to serve interrogatories;

(x) for a stay of proceedings.

Of particular note is sub-paragraph (*e*), which includes as a matter appealable only with leave of court, "an order at the hearing of *any interlocutory application* [emphasis added]" other than certain specified matters. Presumably, once the orders mentioned in the Fourth Schedule of the Act are taken out from the list of specified matters in sub-paragraph (*e*), what is left behind would be matters appealable as of right, such as orders for summary judgment, refusal to set aside a default judgment, striking out an action or defence, dismissal of action and a stay of proceedings.

It would be apparent from this brief description that the definition of "interlocutory application" is crucial in order to understand whether a matter is appealable as of right or appealable only with leave of court. There is no confusion over whether a matter is non-appealable because these are exhaustively listed in the Fourth Schedule. The recent Singapore Court of Appeal decision *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore*[6] ("*OpenNet*") is the first Court of Appeal pronouncement on this subject and interprets the phrase "interlocutory application" in the Act.

The issue before the Court of Appeal in *OpenNet* was whether the Appellant required leave to appeal against an order made by the High Court Judge refusing leave to the Appellant to commence judicial review proceedings.

The Respondent argued, *inter alia*, that the Appellant required leave to appeal because the application for leave to commence judicial review was an "interlocutory application" under sub-paragraph (*e*) of the Fifth Schedule of the Act.[7] According to the Respondent, an application for leave was "interlocutory" in nature because it was "simply a preliminary step to the substantive application for judicial review";[8] it may be made by *ex parte* originating summons without the Respondent being heard;[9] and the Appellant had itself proceeded on the basis that the application was "interlocutory" in nature because its affidavits in support of the application for leave stated that they contained statements of information or belief, which were admissible under O 41 r 5 of the Rules of Court[10] for "interlocutory proceedings".[11]

[6] [2013] SGCA 24.
[7] The Respondent relied on two other grounds but these did not form the *ratio* of the Court of Appeal's decision.
[8] [2013] SGCA 24 at [11].
[9] [2013] SGCA 24 at [11].
[10] Rules of Court (Cap 322, R 5, Rev Ed 2006).
[11] [2013] SGCA 24 at [12].

The Court of Appeal held that the Appellant's subjective belief had no bearing on the proper interpretation of "interlocutory application" under the Act and focused on the crucial question of interpretation.[12] It noted that the Act provided no definition for the phrase "interlocutory application" and that a plain and ordinary meaning of the phrase based on the definitions in various legal dictionaries would seem to exclude an application for leave to commence judicial review where there was no "main hearing determining the outcome of the case".[13] However, more importantly, a purposive reading in context led to the same conclusion.[14]

The Court of Appeal discerned the purpose of the Act from the second reading speech of then Senior Minister of State for Law, Associate Professor Ho Peng Kee ("the Minister"), where the Minister had explained that under the new approach to be embodied in the Act, "[i]nterlocutory applications will now be categorised based on their *importance to the substantive outcome of the case* [emphasis added]" such that "[t]he right to appeal all the way to the Court of Appeal will ... remain for interlocutory applications *that could affect the final outcome of the case* [emphasis added]".[15] This was so as to ensure that interlocutory applications, which usually do not involve novel or important points of law, were not unnecessarily taken all the way to the Court of Appeal. The Court of Appeal also found that this view was clearly reflected in the Act itself, giving the examples of: (1) an application for summary judgment where no appeal was allowed to the Court of Appeal where the application was refused, but where no leave to appeal was required where summary judgment is ordered; and (2) an application to amend pleadings where no appeal may be brought to the Court of Appeal where leave to amend was granted but where leave to appeal may be obtained to appeal to the Court of Appeal where leave to amend was refused.[16]

Applying this approach to an application for leave to commence judicial review, the Court of Appeal held that because the refusal of leave meant that there "was nothing more to proceed on" and that the "substantive rights of the parties had come to an absolute end unless there could be an appeal", the application for leave to commence judicial review was not an "interlocutory application" under sub-paragraph (*e*) of the Fifth Schedule of the Act.[17] Accordingly, no leave to appeal was required before the Appellant filed an appeal against the decision of the High Court refusing leave to commence judicial review proceedings.

With the amendments to the Act, the default position has shifted from one where all interlocutory applications (in the ordinary sense) were appealable as of right (save for the defined exceptions which were either non-appealable or appealable only with leave of the High Court or the Court of Appeal),[18] to a situation where the default position for interlocutory applications is that they are appealable only with leave of the High Court (save for the defined exceptions which were non-appealable or appealable as of right).[19] *OpenNet* has added another layer of nuance to this, by articulating the principle that interlocutory applications which "have the effect of finally disposing of the substantive rights of the parties" (*i.e.* "interlocutory applications" under sub-paragraph (*e*) of the Fifth Schedule) are

[12] [2013] SGCA 24 at [13].
[13] [2013] SGCA 24 at [14].
[14] The purposive approach takes precedence in Singapore by virtue of s 9A(1) of the Interpretation Act (Cap 1, 2002 Rev Ed), which provides that: "In the interpretation of a provision of a written law, an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object."
[15] [2013] SGCA 24 at [17] quoting *Singapore Parliamentary Debates, Official Report* (18 October 2010) vol 87 cols 1367–1395.
[16] [2013] SGCA 24 at [19]–[20].
[17] [2013] SGCA 24 at [21].
[18] See *supra* note **Error! Bookmark not defined.**.
[19] See *Singapore Parliamentary Debates, Official Report* (18 October 2010) vol 87 cols 1367–1395 where the Minister stated that: "the default position is that all interlocutory applications are appealable to the Court of Appeal with leave".

appealable as of right.[20] This is to be welcome given that another reason for leave to appeal being undesirable is that the amendments to the Act further made the decision of the High Court in respect of an application for leave to appeal under s 34(2) of the Act final.[21]

A step-by-step approach to determining whether leave to appeal is required for interlocutory applications not specifically mentioned in the Act after *OpenNet* would be as follows. First, one would ask if the application finally disposes of the substantive rights of the parties. If so, then there is no need for leave to appeal and an appeal may be brought to the Court of Appeal as of right. If not, then one must further consider if the application is non-appealable, *i.e.* whether it falls within the Fourth Schedule. If so, no appeal may be brought to the Court of Appeal. If not, then leave to appeal must be obtained from the High Court.

Applying this approach to some interlocutory applications which are not specifically mentioned in the Act would produce the result that applications for reinstatement of an action that has been automatically discontinued, for renewal of a writ, for setting aside the service of an originating process, and for setting aside an order granting leave to withdraw, to name a few, would be appealable to the Court of Appeal as of right because such applications may have the effect of finally disposing of the substantive rights of the parties. Where any of these applications are refused, the effect would be to bring an action to an end unless there is an appeal.

However, if these applications were analysed on an individual basis, the justification for permitting an automatic right to the Court of Appeal in the light of the aim of reducing unnecessary appeals to the Court of Appeal may be weak. Let us take the application for reinstatement of an action that has been automatically discontinued as an example. Under O 21 r 2(6) of the Rules of Court,[22] if no party to an action has, for more than one year taken any step or proceeding in the action that appears from records maintained by the Court (and there is no extension of time sought before one year has elapsed), the action is deemed to have been discontinued. This tool is an important one to ensure that parties proceed expeditiously with the cases in court. If a High Court Registrar refuses the application for reinstatement and so does the High Court, it is difficult to imagine in what circumstances it would be a good use of judicial time and resources for the Court of Appeal to have to deal with this matter.

Therefore, although the clarification of the Court of Appeal in *OpenNet* is welcome, the drafters of the Act may wish to monitor the situation to see if the aims of the amendments are met for the vast majority of cases. As observed by the Minister, "the categorisation [in the Act] is not cast in stone but can be amended if the need arises in the future".[23]

A review may be particularly appropriate in the light of recent changes to the appeal practice that will see an increase in the workload of the judges of the Court of Appeal in the area of case management.[24] Pursuant to Supreme Court Practice Directions (Amendment No 1 of 2013), a new practice has been instituted whereby each party to a civil appeal will have to file an information sheet related to the appeal, and may also be required to attend before the Court to take directions on the conduct of the appeal.[25] The amendments to the Practice Directions also introduced page limits for the Appellant's Case and Respondent's Case for

[20] [2013] SGCA 24 at [18].
[21] Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), s 34(2B).
[22] Rules of Court (Cap 322, R 5, Rev Ed 2006).
[23] *Singapore Parliamentary Debates, Official Report* (18 October 2010) vol 87 cols 1367–1395.
[24] See Response by Chief Justice Sundaresh Menon, Opening of the Legal Year 2013 and Welcome Reference for the Chief Justice (4 January 2013) at para 32, available online: <http://app.lsc.gov.sg/data/OLY%202013%20-%20CJ%20Speech%20OLY%20Welcome%20Reference.pdf> (last accessed 30 March 2013).
[25] See Supreme Court Practice Directions (Amendment No 1 of 2013), available online: <http://app.supremecourt.gov.sg/default.aspx?pgID=4601> (last accessed 30 March 2013).

civil appeals to the Court of Appeal, and judges of the Court of Appeal may have to deal with requests for leave to exceed the stipulated page limit.[26]

Another significant change in the case management practice of the Supreme Court of Singapore – shifting "to a modified docket system of litigation"[27] – further strengthens the need for a review. Under this modified docket system, it is contemplated that Judges and Registrars will be assigned at an early stage to specific cases and that the Judges will be involved in dealing with the interlocutory processes along the way.[28] As it is likely that a docketed Registrar may work closely with the docketed Judge on case management and dealing with interlocutory applications, the need for a further tier of appeal for interlocutory applications to the Court of Appeal, or at least an avenue for leave to appeal to be sought from the Court of Appeal, may be required in order to retain independent oversight for certain types of interlocutory applications that may not finally dispose of the substantive rights of the parties but would nevertheless have an important impact on the outcome of the case. Examples of these may be interlocutory injunctions, discovery applications and applications relating to further and better particulars.

Further, it may be worthwhile considering whether the framework for determining whether a matter is appealable to the Court of Appeal in the Act may be simplified to enable the ordinary man in the street to understand and apply the law. The current framework although comprehensive, is cumbersome in that it requires reference to s 34(1)–(2) of the Act, which then in turn refers to the Fourth Schedule and the Fifth Schedule, with the Fifth Schedule containing a broad catch-all category in sub-paragraph (*e*) with its own exceptions.

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[26] *Ibid*.
[27] See Response by Chief Justice Sundaresh Menon, Opening of the Legal Year 2013 and Welcome Reference for the Chief Justice (4 January 2013) at para 31, available online: <http://app.lsc.gov.sg/data/OLY%202013%20-%20CJ%20Speech%20OLY%20Welcome%20Reference.pdf> (last accessed 30 March 2013).
[28] *Ibid*.